

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 1668

STATE OF LOUISIANA

VERSUS

HERMAN PIERRE

—
**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 12-06-0400, Section V
Honorable Louis R. Daniel, Judge Presiding**
—

Handwritten initials: DM, KW, HME

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Judgment rendered February 13, 2009

PARRO, J.

Defendant, Herman Pierre, was charged with six counts of simple burglary, in violation of LSA-R.S. 14:62. One count was dismissed at the beginning of the trial. A jury found defendant not guilty on four of the remaining counts, and defendant was convicted as charged on one count. The state filed a petition alleging that defendant was a habitual offender. After a hearing, he was adjudicated a third-felony offender and sentenced to life imprisonment without benefit of probation, parole, or suspension of sentence. Defendant's motion to reconsider sentence was denied, and he appealed, alleging two assignments of error:

1. The trial court erred in denying defendant's motion to suppress an inculpatory statement.
2. The trial court erred in adjudicating defendant a habitual offender.

FACTS

Defendant was charged with a string of vehicle burglaries that took place between October 22 and November 7, 2006, in Baton Rouge. The burglaries occurred during the morning hours and were committed in the same general area of the city. In several of the cases, an older model white van was seen very close to the victims' vehicles just before the burglary was discovered, and a middle-aged black male was seen in or around the white van.

One of the burglaries was committed in the parking lot of the CVS pharmacy on Government Street. The victim was Chasity Christy, a store employee, and the burglary was committed fifteen to thirty minutes after she left her car to begin her shift. Christy noticed a white van in the parking lot when she parked, and she made eye contact with the driver as she went inside. A few minutes later, a friend driving by the store saw a man digging in Christy's car and drove back to get a closer look. While she was stopped at a nearby traffic light, the witness saw the man searching the trunk of Christy's vehicle. The man drove away in a white van when she pulled into the parking lot and parked next to Christy's car. After she saw broken glass around the victim's car, the witness went into the store and told the victim about the man in her car. Christy watched the surveillance tapes from the store's security cameras, which showed

the white van in the parking lot for about an hour and a half before the burglary. The van was moved around several times in the parking lot during that time. Both the victim and her friend testified that the van driven by defendant was similar to the van they saw in the parking lot. The victim identified defendant as the man she saw in the van, and her friend identified defendant as the man she saw searching inside the victim's car. The victim testified that her designer purse was taken from the car, and it contained her wallet, some diamond earrings, cash, a CVS paycheck, her cell phone, and several other personal items.

Defendant was arrested in the parking lot of the Government Street post office after an off-duty fireman flagged down a police car to report that a man was walking around the lot, looking into vehicles and carrying a crowbar. The fireman reported that the man had arrived at the post office in an older model white van. A uniform patrol officer and two of the detectives investigating the series of burglaries went to the post office and saw defendant sitting in a white van. Defendant did not initially admit to the burglaries. He was later interviewed by one of the detectives and was willing to give an oral statement. Defendant claimed he had a severe crack cocaine addiction and admitted he had been involved in a series of burglaries all over the city. He could not specifically recall all of the burglaries but agreed to a "mobile interview" to look at *several locations in the city, some identified by him and others identified by the police.* Defendant was very calm and cooperative, and during the drive he indicated that he "believed" he had entered a vehicle in the CVS parking lot. Although defendant recalled the make and model of several of the cars he entered, he could not recall any identifying information about the car in the CVS parking lot.

MOTION TO SUPPRESS

In assignment of error number one, defendant claims the trial court erred in denying his motion to suppress the statements defendant made after an illegal custodial arrest. Defendant claims that since he was merely sitting in a vehicle in a parking lot, his conduct was not sufficient to initiate an investigatory stop under LSA-C.Cr.P. art. 215.1. He claims, therefore, that the police had no reasonable or probable cause to

arrest him and that the inculpatory statements he made soon after his arrest were so tainted by the illegality of the arrest, they should not have been admitted.

Initially, we note there is no copy of the motion to suppress in this record. The transcript of the trial reflects that the state waived objections to the late filing of a motion to suppress, allowing the court to conduct a hearing on the motion that was filed the day trial began. Although appellate counsel filed a motion to supplement the appellate record with other exhibits and transcripts, a copy of the motion to suppress was not requested.

Nevertheless, even without a copy of the motion available for review, we can determine the subject matter of the motion to suppress. Testimony at the hearing clearly establishes the focus of the proceeding was on defendant's mental state at the time he made the statements, with defendant contending he was "full of drugs" when he was apprehended and the police officers testifying that defendant gave reasonable, responsive answers to their questions. The court found the statements were voluntary and ruled them admissible. There was no challenge to the legality of defendant's arrest.

Louisiana Code of Criminal Procedure article 703 provides the method for a defendant to challenge the admissibility of evidence on constitutional grounds. "A defendant may move on any constitutional ground to suppress a confession or statement of any nature made by the defendant." LSA-C.Cr.P. art. 703(B). However, the "[f]ailure to file a motion to suppress evidence in accordance with this Article prevents the defendant from objecting to its admissibility at the trial on the merits on a ground assertable by a motion to suppress." LSA-C.Cr.P. art. 703(F). A new ground for objection cannot be presented for the first time on appeal. See LSA-C.Cr.P. art. 841; see also **State v. Cressy**, 440 So.2d 141, 142-43 (La. 1983). Accordingly, this claim is not properly before the court.

Moreover, premitting discussion about the validity of the arrest, surely any error in admitting the statements was harmless beyond a reasonable doubt. See LSA-C.Cr.P. art. 921. Although defendant could recall the makes and models of some of the

vehicles he entered, he was acquitted of all of the counts tried in this proceeding except the burglary at the CVS pharmacy, where he was positively identified by two witnesses. Defendant's statement regarding this case was extremely vague, admitting only that he might have committed a burglary at that location, without specificity as to the date, time, or any identification of the vehicle. Despite defendant's admission that he was involved in vehicle burglaries all over the city, the jury convicted defendant only of the offense where an eyewitness identified him as the person seen searching the victim's car. In light of the verdicts acquitting defendant of the other charges tried with this count, the guilty verdict was surely unattributable to the admission of the statement. See State v. Koon, 96-1208 (La. 5/20/97), 704 So.2d 756, 763-66, cert denied, 522 U.S. 1001, 118 S.Ct. 570, 139 L.Ed.2d 410 (1997). Accordingly, this assignment of error has no merit.

HABITUAL OFFENDER ADJUDICATION

In defendant's second assignment of error, he claims the state failed to establish his identity as the person convicted of one of the predicate offenses listed in the petition. Defendant alleges the state did not prove beyond a reasonable doubt that he was convicted in Iberville Parish in 1989, because the fingerprint card from that conviction was not made contemporaneously with either an arrest or conviction so as to establish his identity. He further contends that no other documentation or testimony was offered to establish his identity, and that no testimony was offered to explain the discrepancies between the information contained on the card itself and the testimony of the state's expert witness.

During the adjudicatory hearing, the state introduced a certified true copy of bill of information number 1368-89, charging Herman E. Pierre with a simple burglary committed on April 28, 1989, in Iberville Parish. The state also introduced a certified true copy of a minute entry showing that Herman E. Pierre pled guilty to simple burglary under docket number 1368-89 on August 17, 1989, receiving a sentence of ten years at hard labor.

Tiffany Ponthier, a criminal records analyst for the Louisiana State Police, produced an original fingerprint card from State Police records. The card indicates the fingerprints were taken from Herman Pierre on January 9, 1990, in conjunction with a charge for simple burglary, for which the accused had received a final disposition of ten years. Under the notation "date arrested or received," the form bears the date "8/17/89." Ms. Ponthier compared the prints on that fingerprint card to a certified true copy of the fingerprints on another predicate conviction, bill number 99-655 from Grant Parish, and to the fingerprints taken from defendant in court during the multiple-offender proceeding. She testified with 100% certainty that the three sets of prints were from the same person.¹

Defendant contends the fingerprint card for the 1989 predicate conviction was received by the State Police several months after he pled guilty and was not a contemporaneous record. Defendant further argues that the fingerprint card did not comply with LSA-C.Cr.P. art. 871, which he contends requires the fingerprints to be placed on the bill of information at the time of sentencing.

The certificate required by LSA-C.Cr.P. art. 871 is admissible in evidence and permits the fingerprints to be prima facie evidence of the defendant's identity where such evidence may be useful. See LSA-C.Cr.P. art. 871(C). However, fingerprints on the bill of information are not the exclusive manner by which this fact may be proven. In **State v. Payton**, 00-2899 (La. 3/15/02), 810 So.2d 1127, 1130-31, the Louisiana Supreme Court stated as follows:

"To obtain a multiple offender conviction, the State is required to establish both the prior felony conviction and that the defendant is the same person convicted of that felony." [citations omitted]. In attempting to do so, the State may present: (1) testimony from witnesses; (2) expert opinion regarding the fingerprints of the defendant when compared with those in the prior record; (3) photographs in the duly authenticated record; or (4) evidence of identical drivers license number, sex, race and date of birth. [citations omitted].

¹ Defendant does not contest the proof of his identity for the predicate conviction in Grant Parish.

Admittedly, defendant's fingerprints were not placed directly on bill of information number 1368-89, and the bill of information number does not appear on the fingerprint card. However, Ms. Ponthier identified the fingerprint card as a *document corresponding with the conviction for bill of information number 1368-89*, and the card itself contained identifying information including the defendant's date of birth, height, sex, race, weight, social security number, and DOC number. The same date of birth is included on bill of information number 1368-89, the same date of birth and social security number are included on the bill of information from Grant Parish, and the same DOC number, date of birth, and race appear on the fingerprint card taken in court during the hearing. The subject card identifies the offense, the sentence, and the date the fingerprints were taken. When questioned about the apparent discrepancy in the date of arrest during the hearing, Ms. Ponthier indicated the date of August 17, 1989, was the date of conviction, not the date of arrest.

In light of this evidence and the record as a whole, we conclude the state established beyond a reasonable doubt both the prior felony conviction on August 17, 1989, and that defendant is the same person convicted of that felony. Accordingly, we *find no merit in this assignment of error.*

**CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE
AFFIRMED.**